

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

January 28, 2003

IN RE:

APPLICATION OF BELL SOUTH LONG
DISTANCE, INC. TO EXPAND ITS CERTIFICATE
OF CONVENIENCE AND NECESSITY TO
PROVIDE RESOLD INTERLATA SERVICE IN
TENNESSEE

DOCKET NO.
02-01169

ORDER APPROVING MODIFICATION OF CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY

This matter came before Chairman Sara Kyle, Director Deborah Taylor Tate, and Director Pat Miller of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at the regularly scheduled Authority Conference held on November 18, 2002, for consideration of the *Application of BellSouth Long Distance, Inc. for Approval of a Modified Certificate of Public Convenience and Necessity* (the "Application"), which was filed on October 17, 2002.

BellSouth Long Distance, Inc.'s August 1, 1997 Application

On August 1, 1997, BellSouth Long Distance, Inc. ("BSLD") filed with the TRA an application, pursuant to Tenn. Code Ann. § 65-4-201, for authority to operate in Tennessee as a reseller of long distance service. In its August 1, 1997 application, which was assigned to Docket No. 97-01404, BSLD requested authority to provide incidental interLATA services not precluded by Section 271 of the Federal Telecommunications Act

of 1996 (the "Act")¹ and as specifically defined in Section 271(g).² BSLD also requested that the TRA grant it the authority to provide resold intraLATA toll services and the full array of resold interLATA services contingent upon the Federal Communications Commission's ("FCC") approval of BellSouth's Section 271 application for Tennessee.³ In its Section 271 application, BellSouth is requesting FCC approval, pursuant to Section 271 of the Act, to provide long distance service in Tennessee.⁴ In conjunction with this application filed with the FCC, BellSouth requested a recommendation from the TRA that the FCC grant such approval, in accordance with Section 271(d)(2)(B) of the Act.⁵ The TRA considered this request in TRA Docket No. 97-00309.

¹ 47 U.S.C. § 271.

² Section 271(b)(3) of the Act, 47 U.S.C. § 271(b)(3), provides that a Bell operating company may provide "incidental interLATA services" as defined in Section 271(g), 47 U.S.C. § 271(g). That Section defines such services as "the interLATA provision by a Bell operating company or its affiliate":

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

³ See *In Re: Application of BellSouth Long Distance, Inc. for a Certificate of Convenience and Necessity to Provide Operator Services and Resell Interexchange Telecommunications Services in Tennessee*, Docket No. 97-01404, *Order Granting in Part and Denying in Part Application for Certificate of Public Convenience and Necessity*, 5-6 (May 4, 1999).

⁴ *In the Matter of Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Tennessee and Florida*, WC Docket No. 02-307.

⁵ 47 U.S.C. § 271(d)(2)(B).

Several parties intervened in Docket No. 97-01404.⁶ During a Hearing on the merits conducted on April 28, 1998, the interveners argued that the Authority should deny BSLD's application on the ground that it was premature.⁷ The interveners stated that BellSouth must first receive Section 271 approval from the FCC before seeking authority to provide long distance service from the TRA.⁸ The interveners argued that the Authority is limited to granting a CCN for BSLD to provide only the incidental interLATA services specified in Section 271(g) of the Act.⁹ The interveners also stated that the TRA has no authority to issue a contingent certificate authorizing BSLD to provide services in the future that are prohibited by federal law.¹⁰

Following the April 28, 1998 Hearing, the Authority granted BSLD's August 1, 1997 application in part and denied the application in part.¹¹ The Authority granted BSLD's application to the extent that BSLD was authorized to provide only resold incidental interLATA services as defined in Section 271(g) of the Act and resold intraLATA toll services.¹² However, the Authority denied BSLD's request for authority to provide resold in-region interLATA services other than the incidental services identified in Section 271(g) of the Act.¹³ The Authority issued an *Order Granting in Part and Denying in Part Application for Certificate of Public Convenience and Necessity* on May 4, 1999.

⁶ AT&T Telecommunications of the South Central States, Inc., NEXTLINK Tennessee, LLC, MCI Telecommunications Corporation, Time Warner Communications of the Mid-South, LP, the Communications Workers of America, AFL-CIO, and TCG Mid South, Inc. sought and were granted intervention in Docket No. 97-01404.

⁷ *Order Granting in Part and Denying in Part Application for Certificate of Public Convenience and Necessity*, 6 (May 4, 1999).

⁸ *Id.*

⁹ *Id.*, p. 7.

¹⁰ *Id.*

¹¹ *Id.*, p. 9.

¹² *Id.*

¹³ *Id.*

BellSouth Long Distance, Inc.'s October 17, 2002 Application

BSLD filed the *Application* which is the subject of this docket on October 17, 2002. In the *Application*, BSLD requests that the Authority modify its CCN to permit it to provide operator and interLATA toll services in Tennessee. In its *Application*, BSLD states that circumstances have changed since the Authority approved its CCN on a limited basis in Docket No. 97-01404, most notably with regard to BellSouth's Section 271 application for Tennessee. BSLD states:

The Authority has recently approved BellSouth's Statement of Generally Available Terms, found BellSouth to have complied with the 14-point checklist set forth in Section 271, and found BellSouth to be in compliance with the separate affiliate requirements of Section 272. The Authority also voted unanimously to recommend to the FCC that BellSouth's 271 application be approved.¹⁴

Additionally, BSLD states that the FCC is expected to rule on BellSouth's Section 271 application for Tennessee on or before December 19, 2002.¹⁵ As a result, BSLD requests that the Authority modify its existing CCN to allow it to provide interLATA long distance services in Tennessee contingent upon the FCC's anticipated approval of BellSouth's Section 271 application for Tennessee.¹⁶ BSLD states that it will not provide interLATA services in Tennessee until the FCC has issued an order approving BellSouth's Section 271 application and the FCC's order has gone into effect.¹⁷ However, BSLD requests that the Authority approve the modification of its CCN so that it may begin reselling operator and toll services in Tennessee immediately upon receiving FCC

¹⁴ *Application of BellSouth Long Distance, Inc. for Approval of a Modified Certificate of Public Convenience and Necessity*, Docket No. 02-01169, October 17, 2002, p. 2 (the "*Application*").

¹⁵ *Id.*, p. 1. December 19, 2002 is the statutory deadline for the FCC's determination with regard to BellSouth's 271 application for Tennessee, as provided in Section 271(d)(3) of the Act, 47 U.S.C. § 271(d)(3).

¹⁶ *Id.*, p. 2.

¹⁷ *Id.*

approval.¹⁸ No party sought intervention in this docket.

Findings and Conclusions

I. Changed Circumstances Following BellSouth Long Distance, Inc.'s August 1, 1997 Application

In its May 4, 1999 Order in Docket No. 97-01404, the Authority stated:

The Authority finds that approval at this time of BSLD's application regarding the interLATA services other than those incidental services identified in Section 271(g) of the Federal Act would amount to a contingent certificate. The contingency would be approval by the FCC of BST's Section 271 application. BSLD cites no statutory authority or precedential authority to support the granting of a contingent certificate. Further, the United States Supreme Court has ruled that:

A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or may not occur at all.¹⁹

Thus far, no Bell Operating Company has been able to convince the FCC that it has met all the requirements of the Act to be allowed to offer interLATA long distance service in any state. BST has failed in three attempts to receive Section 271 relief to provide interLATA services even with positive recommendations of the respective State Utility Commissions in South Carolina and twice in Louisiana. When BST might clear this hurdle is unknown. Accordingly, the Directors deny BSLD's request for authority to provide services that may be allowed after the FCC grants BST 271 relief.²⁰

Significant changes have taken place since BSLD's August 1, 1997 application in Docket No. 97-01404. Unlike the circumstances at the time of the August 1, 1997 application, BellSouth has a Section 271 application for Tennessee pending before the FCC that must be decided by December 19, 2002. The TRA has found in Docket No. 97-00309 that BellSouth complies with the requirements of Section 271 and has

¹⁸ *Id.*

¹⁹ *Texas v. United States* 118 S. Ct. 1257 (1998) (Footnote in original).

²⁰ *Order Granting in Part and Denying in Part Application for Certificate of Public Convenience and Necessity*, 8-9 (May 4, 1999).

recommended that the FCC approve BellSouth's Section 271 application for Tennessee.²¹ The United States Department of Justice has likewise recommended approval of BellSouth's Section 271 application for Tennessee.²²

It is now reasonable to anticipate that BellSouth will receive approval from the FCC to provide non-incidental, interLATA long distance services in Tennessee on or before December 19, 2002. Whereas at the time of BSLD's application in Docket No. 97-01404, the FCC had on three (3) occasions (twice for Louisiana and once for South Carolina) denied Section 271 applications filed by BellSouth,²³ the FCC has now approved BellSouth's Section 271 applications for seven (7) states, including Louisiana and South Carolina.²⁴ Further, the FCC has found that BellSouth's operational support systems (OSS) are the same throughout the BellSouth region,²⁵ and thus it is reasonable to conclude that the FCC will also find that BellSouth's OSS for Tennessee are also nondiscriminatory.

II. Compliance with Tenn. Code Ann. §§ 65-4-201(c) and 65-5-212

The Authority's May 4, 1999 Order in Docket No. 97-01404 stated the following findings which are required for the granting of a CCN:

²¹ See *In Re: BellSouth Telecommunications, Inc. Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 97-00309, *Advisory Opinion of the Tennessee Regulatory Authority to the FCC Relating to BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996*, 47 (October 10, 2002).

²² *In the Matter of Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, WC Docket No. 02-307, *Evaluation of the Department of Justice* (October 25, 2002).

²³ See *Order Granting in Part and Denying in Part Application for Certificate of Public Convenience and Necessity*, 9 (May 4, 1999).

²⁴ See *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 F.C.C.R. 9018 (2002) (Memorandum Order and Opinion) ("FCC Georgia/Louisiana Order"); *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 F.C.C.R. 17,595 (2002) (Memorandum Order and Opinion).

²⁵ *FCC Georgia/Louisiana Order*, 17 F.C.C.R. 9018, at 9068.

[B]ased on a review of of BSLD's application and the entire record in this matter, the Authority finds that BSLD satisfies the managerial, financial and technical requirements contained in Tenn. Code Ann. § 65-4-201(c). Further, pursuant to the additional requirements of Tenn. Code Ann. § 65-4-201(c), the Authority finds that BSLD has demonstrated its willingness to adhere to all applicable policies, rules and orders. Additionally BSLD has filed an acceptable small and minority-owned telecommunications business participation plan pursuant to Tenn. Code Ann. § 65-5-212.²⁶

The Authority is not aware of, nor has any person submitted to the Authority, any evidence that would require the Authority to qualify, alter, or rescind these findings. Therefore, the Authority finds that BSLD continues to meet the requirements of Tenn. Code Ann. §§ 65-4-201(c) and 65-5-212.

III. Section 272 Affiliate Safeguards

Additional support for granting a modification of BSLD's CCN comes from actions taken by BellSouth to comply with the affiliate safeguards contained in Section 272 of the Act.²⁷ Section 272(a)(1) requires a Bell operating company to offer interLATA long distance services through an affiliate separate and independent of the entity that offers local services and interconnection services to competitors. BSLD serves as BellSouth's separate long distance affiliate as required by Section 272. Section 272 further provides that all transactions between the Bell operating company and its long distance affiliate must be conducted on an arm's-length basis and may not discriminate between the Bell operating company or its affiliate and other providers.²⁸ As part of the testimony it presented in Docket 97-00309, BellSouth presented audited consolidated financial statements²⁹ attesting that BellSouth is complying with the FCC's affiliate transaction

²⁶ *Order Granting in Part and Denying in Part Application for Certificate of Public Convenience and Necessity*, 7-8 (May 4, 1999).

²⁷ 47 U.S.C. § 272.

²⁸ 47 U.S.C. §§ 272(b)(5) and 272(c).

²⁹ ²⁹ Direct Testimony of John A. Ruscilli, Docket 97-00309, April 26, 2002, Exhibit JAR-16.

rules.³⁰ The Authority concluded from this evidence that BellSouth had sufficiently demonstrated its willingness to comply with the requirements of Section 272.³¹

The Authority also concluded in Docket No. 97-00309³² that BellSouth demonstrated that it is meeting the structural separations requirements of Section 272(b) of the Act.³³ The testimony of BellSouth witness John A. Ruscilli, submitted in Docket No. 97-00309, states that: (1) BSLD is maintaining books, records, and accounts separate from the books, records, and accounts maintained by BellSouth; (2) BSLD accounting structure complies with the FCC's Uniform System of Accounts; (3) BSLD has officers, directors, and employees separate from those of BellSouth; and (4) no creditor of BSLD has any recourse to the assets of BellSouth.³⁴

Another safeguard included in the Act is a biennial audit to determine whether a Bell operating company is in compliance with safeguards and requirements of Section 272. Once a Bell operating company is authorized to provide in-region interLATA services in any of its incumbent states, Section 272(d)(1) of the Act requires that such an audit be conducted every two (2) years by an independent auditor.³⁵ A joint federal/state oversight team ("JOT") will be responsible for overseeing the work of the auditors.³⁶

Pursuant to Section 272(d)(1) of the Act, BellSouth will select an independent accounting firm to perform the biennial audit, and the TRA will receive the results of the

³⁰ 47 C.F.R. §§ 64.901 - 64.904.

³¹ *In Re: BellSouth Telecommunications, Inc. Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 97-00309, *Advisory Opinion of the Tennessee Regulatory Authority to the FCC Relating to BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996*, 45 (October 10, 2002).

³² *Id.*

³³ 47 U.S.C. § 272(b).

³⁴ Direct Testimony of John A. Ruscilli, Docket 97-00309, April 26, 2002, Exhibit JAR-16.

³⁵ 47 U.S.C. § 272(d)(1).

³⁶ *Id.*

audit and make them available for public inspection as required by Section 272(d)(2) of the Act.³⁷ This Section also allows any party to submit comments on the final audit report.³⁸

Based upon the above findings, the Authority finds that BellSouth and BSLD have sufficiently demonstrated their willingness and ability to comply with the separate affiliate requirements of 47 U.S.C. 272 and the FCC's affiliate transaction rules.

Summary of Findings and Conclusion

Based upon a careful review of the *Application*, and of the entire record in this matter, the Authority finds that BSLD's *Application* presents to the Authority a significantly different set of circumstances from those prevailing at the time of BSLD's August 1, 1997 application. In light of these altered circumstances, the Authority finds that modification of BSLD's CCN to include the authority to provide interLATA long distance services in Tennessee, contingent upon the FCC's anticipated approval of BellSouth's Section 271 application for Tennessee, is justified. BellSouth has asserted that the required affiliate safeguards are in place, and the JOT is in place to confirm this assertion and verify that the safeguards are in effect. The Authority's findings regarding BSLD's compliance with Tenn. Code Ann. §§ 65-4-201(c) and 65-5-212, as stated in the Authority's May 4, 1999 Order in Docket No. 97-01404, remain valid. Finally, FCC approval of BellSouth's Section 271 application for Tennessee is no longer a remote contingency, as the Authority found in Docket No. 97-01404, but is instead a condition likely to be met in the near future. The Authority thus concludes that modification of BSLD's CCN based on the condition of FCC approval is no longer an unwarranted reliance on a contingency and is no longer impermissible under the standard of *Texas v.*

³⁷ 47 U.S.C. § 272(d)(2).

³⁸ *Id.*

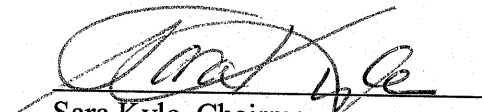
United States, 118 S. Ct. 1257 (1998).

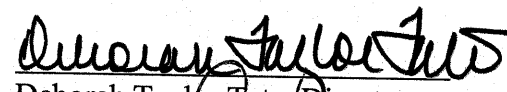
Accordingly, at the November 18, 2002 Authority Conference, the voting panel voted unanimously to approve BSLD's *Application* to provide interLATA long distance services in Tennessee, contingent upon the FCC's approval of BellSouth's Section 271 application for Tennessee.³⁹


IT IS THEREFORE ORDERED THAT:

1. The *Application* of BellSouth Long Distance, Inc. for a modification of its certificate of public convenience and necessity to allow Bellsouth Long Distance Inc. to provide interLATA long distance services in Tennessee is approved contingent upon the Federal Communications Commission's approval of BellSouth's application, pursuant to 27 U.S.C. § 271, for authority to provide long distance service in Tennessee.

2. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration within fifteen (15) days from and after the date of this Order.


Sara Kyle, Chairman


Deborah Taylor Tate, Director


Pat Miller, Director

³⁹ The Authority made its findings and reached its decision with regard to BSLD's Application based on the reasonable expectation that the FCC would grant BellSouth's Section 271 Application for Tennessee. Since the Authority's action, the FCC has, in fact, granted BellSouth's Section 271 Application for Tennessee. See *In the Matter of Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, WC Docket No. 02-307, *Memorandum Order and Opinion* (December 19, 2002).